

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY D. WHITE,

Defendant-Appellant.

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UNPUBLISHED

August 24, 2001

No. 219374

Wayne Circuit Court

Criminal Division

LC No. 98-012345

Before: Bandstra C.J., and Whitbeck and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and sentenced to a term of seven to twenty years' imprisonment. He appeals as of right. We affirm defendant's conviction, but remand for further proceedings in connection with defendant's sentence.

Defendant argues that the trial court erred in admitting evidence of other occasions when he allegedly broke into the complainant's home. We disagree.

Evidence of other bad acts is generally inadmissible, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). To be admissible under MRE 404(b), bad acts evidence must generally satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). Additionally, in order to ensure that the jury does not consider such evidence for an improper purpose, the trial court may provide a limiting instruction upon request. *Id.*, 75.

A proper purpose is one other than establishing the defendant's character to show his propensity to commit the charged offense. *VanderVliet*, *supra* at 74. Indeed, the list of exceptions in MRE 404(b) is nonexclusive. In other words, "[t]here is no policy of general exclusion relating to other acts evidence," and "[r]elevant other acts evidence does not violate rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *VanderVliet*, *supra* at 65. In the instant matter, we agree that the evidence in question was admissible to show defendant's "plan, scheme or system" of breaking into the complainant's house because she was unlikely to aggressively pursue criminal

charges against him. Thus, we believe that the evidence served a proper purpose under MRE 404(b). See *People v Sabin*, 463 Mich 43, 63-67; 614 NW2d 888 (2000). Furthermore, because the defense theory was that the complainant fabricated the charges to stop him from borrowing money from her, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. Thus, the trial court did not abuse its discretion in admitting the evidence.

Defendant next argues that improper conduct by the prosecutor denied him a fair trial. Because defendant did not object to any of the alleged instances of misconduct below, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994). The only conduct that we conclude constituted plain error was the prosecutor's conduct in asking defendant to comment on the veracity of the prosecution's witnesses. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Defendant does not explain, however, how this conduct affected the outcome of trial. Moreover, we note that, before the questioning, defendant had already advanced his theory that the complainant was fabricating the allegations because she was tired of providing him money to support his drug habit. Under the circumstances, we conclude that defendant has failed to show that his substantial rights were affected by the improper questions. Accordingly, reversal is not warranted on the basis of this unpreserved issue.

Defendant also argues that he was deprived of his constitutional right to effective assistance of counsel. We disagree. To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Counsel's performance must be measured against an objective standard of reasonableness, without the benefit of hindsight, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999).

Defendant claims that counsel was ineffective because he questioned the complainant in detail about her allegations of the other "bad acts." Because the questioning was consistent with a trial strategy of challenging the complainant's veracity, we do not believe that this questioning was unreasonable. Indeed, decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Furthermore, although counsel elicited evidence of defendant's drug use, this was relevant to the complainant's purported motive to fabricate the charges against defendant—i.e., to avoid defendant's persistent requests for money to support his drug habit.

Defendant also argues counsel was ineffective for failing to object to complainant's testimonial reference to a police report. Despite defendant's claims that this evidence was inadmissible as hearsay, the evidence could fairly be viewed as undermining the complainant's

credibility. Therefore, we do not believe this evidence was prejudicial. Along the same lines, defendant has also failed to show any prejudice stemming from counsel's failure to object to the other acts evidence for lack of proper notice under MRE 403(b)(2). Rather, defense counsel did a commendable job in minimizing the impact of the evidence.<sup>1</sup> In addition, to the extent that counsel failed to object during the prosecutor's closing argument, we are satisfied with his testimony that this was an intentional strategy to avoid alienating the jury.

Defendant contends that counsel was also ineffective for failing to call an alleged alibi witness. Defendant did not present any testimony at the *Ginther*<sup>2</sup> hearing to factually support his claim that the witness could have provided favorable testimony. Instead, defendant relied on an affidavit of the purported witness, defendant's brother. Counsel testified that he interviewed the potential alibi witness before trial, but concluded that the witness could not offer testimony establishing a valid defense. Counsel's testimony calls into question the veracity of the affidavit, and supports his decision to not call the witness. Thus, we are not persuaded that ineffective assistance of counsel has been shown for failing to call this witness.

Although defendant argues that he is entitled to a new trial because of the cumulative effect of several errors, we conclude that any errors that did exist did not deprive defendant of a fair trial. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995); *People v Dilling*, 222 Mich App 44, 56; 564 NW2d 56 (1997).

Defendant also argues that his sentence is disproportionate. To facilitate appellate review of a defendant's sentence, the sentencing court must articulate on the record the criteria considered and the reasons for the sentence imposed. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987); *People v Peña*, 224 Mich App 650, 661; 569 NW2d 871 (1997), modified 457 Mich 885 (1998). Here, defendant was convicted of an offense that is not subject to the sentencing guidelines and the trial court did not articulate any reasons for the sentence imposed. Under the circumstances, we conclude that remand for a statement of the reasons for defendant's sentence is appropriate. See *People v Triplett*, 432 Mich 568, 569; 442 NW2d 622 (1989). We shall retain jurisdiction to review defendant's proportionality issue in light of the trial court's explanation. *Peña, supra*, 457 Mich 885.

Affirmed in part and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Richard A. Bandstra  
/s/ William C. Whitbeck  
/s/ Donald S. Owens

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<sup>1</sup> In fact, defendant was acquitted on the charge of armed robbery.

<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).